In the Supreme Court of the United States

OCTOBER TERM, 1959

No. .....

G. T. RUMMEL, MATTHEW P. ROWE, ROY M. EIDAL, M. M. HARDIN, doing business as LA SALLE MINING COMPANY, a Partnership,

Appellants,

v.

WILLIAM E. MUSGRAVE, as County Assessor of Montrose County, Colorado; RUTH E. GAINES, as County Treasurer of Montrose County, Colorado; ORIN E. SMITH, FRED L. SULLIVAN and DON E. WATSON, as the Board of County Commissioners of Montrose County, Colorado; and TIM ARMSTRONG, State Treasurer of the State of Colorado.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF COLORADO

JURISDICTIONAL STATEMENT

FRED M. WINNER,
Majestic Building,
Denver, Colorado,
EUGENE H. MAST,
First National Bank Bldg.,
Grand Junction, Colorado,
Attorneys for Appellants.

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ON APPEAL FROM THE SUPREME COURT OF THE STATE OF COLORADO

JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the Supreme Court of the State of Colorado entered on March 28, 1960, affirming a judgment of the District Court for the County of Montrose, Colorado. This statement is submitted to show that the Supreme Court of the United States has jurisdiction of the Appeal and that a substantial question is presented.

OPINIONS BELOW

The opinion of the Supreme Court of Colorado (App. A, infra pp. 1a-3a) is reported in 350 P. 2nd 825. The judgment of the trial court, (App. B, infra pp. 7a-8a) the District Court of Montrose County, Colorado, is not reported.

JURISDICTION

The appellants are lessees of land owned by the United States located in Montrose County, Colorado. This Federally-owned land was leased to appellants by The Atomic Energy Commission for the production of uranium ores pursuant to the terms of the 1946 Atomic Energy Act. Taxes were levied against the property of the United States under the provisions of Chapter 137-5-4, Colorado Revised Statutes, 1953, and assessed to appellants. For tax purposes the value of the real property was measured by the value of the uranium ores extracted therefrom. The taxes were assessed to appellants, lessees of the land, who paid the taxes under protest. Appellants brought this action in the District Court of Montrose County, Colorado, to recover taxes so paid. Appellants also sought to have the Colorado Statute declared inapplicable under the circumstances of this case and to have the appellees, County and State officials, enjoined from exercising any rights against them under this statute. Throughout the proceedings, in the trial court and in the Colorado Supreme Court, the appellants urged and alleged that as applied to this case the Colorado Statute was repugnant to the Constitution of the United States and invalid. The Colorado Supreme Court upheld the validity of the statute and of the tax upon appellants as lessees of the United States. The Decision and judgment of the Colorado Supreme Court were entered on March 28, 1960, and the same are attached as Appendix A, infra pages 1a and 4a. Appellants filed their petition for rehearing and the same was denied April 18, 1960. (App. A, infra pp.

7a). Notice of Appeal to this Court was filed by appellants on June 16, 1960.

Jurisdiction to review the judgment of the highest court of a state by appeal is conferred on this Court by 28 U.S.C. 1257 (2). The following decisions sustain the jurisdiction of the Supreme Court to review this judgment on direct appeal: Myles Salt Company v. Bondurant, 257 U.S. 282; United States v. City of Detroit, 355 U.S. 466; Phillips Chemical Company v. Dumas Independent School District, ... U.S. ...., 4 L. Ed. 2d 384.

STATUTE INVOLVED

Chapter 137-5-4, Colorado Revised Statutes, 1953, Volume 5, page 926:

"Assessment of producing mines. All mines and mining claims bearing gold, silver, lead, copper or other precious or valuable minerals and possessory rights therein classified under the laws of this state as producing mines shall be assessed annually for the purposes of taxation as provided in this section:

(1) Every person, corporation or association owning or operating any mines or mining claims which shall be a producing mine between the first and thirty-first days of January in each year, shall make out and deliver to the assessor of the county wherein such property is situate a statement showing:

(a) The name of the mine or mining claim.

(b) The name of the owner thereof.

(c) The number of acres contained in such mine or mining claims.

(d) The number of tons of ore extracted during the preceding year.

(e) The gross value of any such ore extracted, in dollars and cents.

(f) The actual cost of extracting same from mine, which shall include cost of liability and workmen's compensation insurance, but shall not include the salaries of any officers or agents not actively and consecutively engaged in or about the mine.

(g) Actual cost of transportation to place of reduction or sale.

(h) Actual cost of treatment, reduction or sale.

(i) The net proceeds, in dollars and cents, after deducting the above expenses.

Which statement shall be signed and sworn to by such person or the superintendent or managing agent of such corporation or association.

(2) The assessor, when he receives such statement, shall determine the gross proceeds of any such producing mine or mining claim for said preceding year, and at the same time shall determine the net proceeds for said preceding year, and for the purpose of assessment for taxation shall value such producing mine or mining claim at a sum equal to one-fourth of the gross proceeds for said preceding year for any such mine or mining claims. If the net proceeds of any such producing mine or mining claim for said preceding year exceeds one-fourth of the gross proceeds, then any such producing mine or mining claim shall be valued for the purpose of assessment for taxation at the amount determined by the assessor as the net proceeds for said preceding year for any such producing mine or mining claim. Any number of contiguous claims owned and operated as one property by the same person, association or corporation, the gross production of which shall be more than five thousand dollars per annum, shall be deemed and considered to be one producing mine for the purposes of this chapter.

(3) *In case the mine or mining claim shall not be patented, or entered for patent, but shall be assessable and tax-*

able under this chapter on account of producing gross proceeds, then the possession shall be the subject of the assessment and if said mining property be sold for taxes levied, the sale for such tax shall pass the title and the right of possession to the purchaser under the laws of Colorado; and the number of the survey or the name of the lode or claim, and the name of the mining district shall be sufficient description for the purposes of taxation and assessment of mining property."[1]

QUESTIONS PRESENTED

The Colorado Supreme Court construed Chapter 137-5-4, Vol. 5, page 926, Colorado Revised Statutes, 1953 as authorizing the levy of a tax against appellants, lessees of the United States of Federally-owned land. The tax was measured by the value of uranium ores produced from the Federally-owned land. The Colorado statute creates a lien upon land and provides for the sale thereof and the issuance of a treasurer's deed if the taxes remain unpaid. No Colorado statute imposes a tax on the lessee of other tax-exempt property. The questions presented are:

1. Whether this Colorado statute, as applied by the Colorado Supreme Court in this case, is repugnant to the Constitution of the United States and invalid because it taxes to appellants land which is not owned by the appellants but which is owned by the United States and on which the State may not assess taxes, Congress not having assented thereto.

2. Whether this Colorado statute, as here applied, is repugnant to the Constitution of the United States because it discriminates against the United States and those with whom it deals, and imposes an unconstitutional burden on the Federal Government and infringes upon its sovereignty.

3. Whether this Colorado statute, as here applied, is repugnant to the Constitution of the United States and in-

[1]The italicized portion is particularly pertinent to this case.

valid as violative of the Due Process and Equal Protection clauses of the Fourteenth Amendment because it constitutes discriminatory and arbitrary legislation against lessees of Federal property.

STATEMENT

The United States is, and at all times has been, the owner in fee simple of land in Montrose County, Colorado. On January 5, 1951, The United States Atomic Energy Commission pursuant to authority conferred upon it by the Act of August 1, 1946, 60 Stat. 765, leased this land to appellants for the purpose of mining uranium ores. The lease, which imposed heavy work commitments and obligations upon appellants, was for the primary term of three years subject to the right of the Government to terminate the lease upon failure of the lessee to perform any of the conditions or agreements therein contained. The lease was granted only for the purpose of mining and included the right to use the surface only as necessary for the conduct of mining operations. The lessees were required to ship all ores produced to such receiving stations as the Government might designate. The lease provides that the headframe, all tracks, rails, pipelines, bins, mine timbering and underground improvements shall become the property of the Government upon termination of the lease for any reason. The lease of January 5, 1951, which was subsequently extended and amended, is found at pages 24-28, transcript of record. Appellants, as lessees of the United States, fulfilling their leasehold obligations, produced uranium ores and delivered the same to a receiving station designated by the Government. The land of the United States was assessed to appellants under the provisions of Chapter 137-5-4, Colorado Revised Statutes, 1953, which is set forth above. At the time of trial appellants had paid $41,017.93 in taxes under protest. On January 27, 1959, subsequent to the trial court proceedings, appellants tendered an additional

$8,805.53 into court for the purpose of paying under protest, taxes levied for 1957.

Taxes levied on personal property owned by appellants and used in carrying out the leasehold obligations were paid in full, without objection or protest and taxes on personal property are not herein involved.

Appellants brought their action in the District Court of Montrose County to recover taxes so paid by them, alleging that the land was owned by the United States, that it was leased to them for the purpose of producing uranium and that the land of the United States was taxed to appellants under the terms of the above Colorado Statute. Appellants also sought an injunction prohibiting appellees from exercising any rights against them under the circumstances of this case. The District Court, denying appellants any relief, found the taxes were levied under this Colorado Statute and that appellants claimed they had been wrongfully assessed as to their taxes by Montrose County "as their mining claims were all located on Government land, and they were operating under a lease, and that such land was not subject to taxation." (App. B, infra p. 7a.) Writ of Error was taken to the Colorado Supreme Court, which affirmed the judgment of the District Court. In its opinion the Colorado Supreme Court recited that appellants contended that the finding of the trial court is the same as holding that the State of Colorado can lawfully assess and tax real estate owned by the United States. (App. A, infra, p. 2a.) The Colorado Supreme Court thus recognized appellants were asserting that the Colorado statute was repugnant to the Constitution of the United States, as applied to the circumstances of this case for the reason that appellants were assessed with a tax on real property owned by the United States. In the Opening Brief filed by appellants with the Supreme Court of Colorado the question of the constitutionality of a tax on lands of the United States was specifically raised. (Page 16, Brief attached to page

110 of the record). McCulloch v. Md., 4 Wheat 316 was cited at page 19 of the same brief. The seventeenth clause, eighth section of the First Article U. S. Constitution was cited at page 25 of the same brief. The Colorado Supreme Court rejected the constitutional objection and said "and no constitutional question is involved." (App. A, infra, p. 3a.) The Colorado Supreme Court in its opinion cited Detroit v. Murray Corp. 355 U.S. 489, U. S. v. Detroit, 355 U.S. 466, U. S. v. Muskegon 355 U.S. 484, (App. A, infra, p. 3a) apparently as authority for taxing a lessee of the United States for lands owned by the United States. The Colorado Supreme Court also cited Phillips Chemical Company v. Dumas Independent School District, ... U.S. .... 4 L. Ed. 2nd 384, as upholding the tax levied on appellants, saying (App. A, infra, p. 3a) the instant case did not fall within the Phillips case. Thus, the Colorado Supreme Court injected into this case the constitutional question of whether the United States and those with whom it deals, the appellants, were being unconstitutionally discriminated against.

THE QUESTIONS ARE SUBSTANTIAL

The important constitutional question of whether a state can validly levy taxes against real estate of the United States under a statute which creates a lien on the real estate and directs the sale thereof if the taxes are not paid, and compel a lessee of the United States to pay such tax is presented by this appeal. The Colorado statute was originally enacted in 1887 and was held valid when applied to an unpatented mining claim in Elder v. Wood, 208 U.S. 226. There, the contention was made that as to an unpatented mining claim title remained in the United States and the tax was void. This Court, recognizing that an unpatented mining claim is property, upheld the tax and the validity of a treasurer's deed which issued for non-payment of the tax. This Court has subsequently held a mining claim "is property in the fullest sense of that term." Ickes v. Vir-

ginia-Colorado Development Corp. 295 U.S. 639, at 644. The leasehold right of a lessee of the United States is not the same as the right created in the locator of a mining claim on public domain of the United States. The Colorado Supreme Court cited and relied on the Michigan cases decided in 1957.[2] However, in the Michigan cases this court emphasized that the Michigan taxes were use taxes and that the Michigan statute creating the tax affirmatively provided that the tax "shall not become a lien against the property." The vast difference between the Michigan and Colorado statutes is apparent. Colorado has no statute taxing the leasehold interest of a lessee of tax-exempt real estate, and under the decision herein appealed from, only lessees of the United States are taxed. This appeal thus presents substantial constitutional questions of basic importance and which arise in the delicate area of intergovernmental tax immunity.

I. THE STATUTE AS APPLIED IS AN UNCONSTITUTIONAL TAX ON FEDERAL PROPERTY ASSESSED AGAINST APPELLANTS

No legal principle has been more firmly established than that property owned by the Federal Government is constitutionally immune from direct taxation by a state. McCulloch v. Md. (US) 4 Wheat 316. This court has had occasion to recently approve McCulloch v. Md. and strike down a state taxing statute in conflict therewith. Phillips v. Dumas, ... U.S. ..... 4 L. Ed. 2d 384; McCulloch v. Md. was also approved in U. S. v. Detroit, 355 U.S. 466. In United States v. Allegheny County, 322 U.S. 174 a state attempted to levy a tax on the lessee of machinery owned by the United States, this Court in striking down the tax said:

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[2]United States v. City of Detroit, 355 U.S. 466; United States v. Township of Muskegon, 355 U.S. 484; City of Detroit v. Murray Corp., 355 U.S. 489.

> "* * * the Government's property interests are not taxable either to it or to its bailee" (322 U.S. at 187)
> "* * * Government-owned property, to the full extent of the Government's interest therein is immune from taxation, either as against the Government itself or as against one who holds it as a bailee" (id at 189).

The tax held valid by the Colorado Supreme Court is likewise invalid as an unconstitutional attempt to tax Federal property against the lessee thereof. The Colorado statute does not tax the use of the property as does the Michigan statute, but taxes the land itself, and provides:

> "* * * and if said property be sold for taxes levied, the sale for such tax shall pass the title and the right of possession to the purchaser under the laws of Colorado; and the number of the survey or the name of the lode or claim, and the name of the mining district shall be sufficient description for the purposes of taxation and assessment of mining property" Chapter 137-5-4 (3), Colorado Revised Statutes, 1953.

In its decision in the Murray Corp. case the Court pointed out "there was no effort to hold the United States or its property accountable." 355 U.S. at 493. In United States v. Detroit, 355 U.S. 466, 469, this Court also stressed the fact that any taxes due under the Michigan statutes are the personal obligation of the private lessee or user and said "The owner is not liable for their payment nor is the property itself subject to any lien if they remain unpaid."

The Michigan statute upheld in United States v. Detroit specifically provides that the tax "shall not become a lien against the property."

Colorado property taxes are levied as provided by Chapter 137 of the Colorado Revised Statutes, 1953. This statute at Chapter 137-1-12 defines "real estate" as follows:

> "The term 'real estate' includes, first * * * * second,

all mines, minerals and quarries in and under the land, and all rights and privileges appertaining thereto;"

In 1957 the foregoing statute was repealed and the above quoted definition was re-enacted verbatim, Colorado Session Laws, 1957, Chapter 267, page 803, Sec. 3(4), (C. 137-12-2(4), C.R.S. '53). At all times pertinent to this case and until 1957 the statute creating a lien for taxes was found at Chapter 137-1-3, C.R.S. '53, and was as follows:

"• • • Taxes levied upon real estate shall be a perpetual lien upon such real estate, until such taxes and any penalty, charges and interest which may accrue thereon shall be paid, and such liens shall have priority over all other liens. • • •"

In 1957 the foregoing statute was repealed and the following statute was enacted, Colorado Session Laws, 1957, Chapter 267, page 806, Section 13:

"Taxes levied upon real estate shall be a perpetual lien upon such real estate until such taxes and any interest, penalties and charges which may accrue thereon shall have been paid, except as otherwise provided in this chapter, and such liens shall have priority over all other liens. • • •"

The conclusion that Colorado, by the decision of its Supreme Court from which this appeal is taken, has approved the levy of a tax constituting a lien upon real estate of the Federal Government, for the non-payment of which tax the real estate of the Federal Government may be sold, is thus apparent.

The difference between the Michigan statute and the Colorado statute is apparent and fundamental. This Colorado statute, as applied by the Colorado Supreme Court to Federally-owned lands interferes with the exercise by the United States of its constitutional power as to Federal property in Colorado.

II. THE STATUTE AS CONSTRUED BY THE COLORADO SUPREME COURT DISCRIMINATES AGAINST THE UNITED STATES AND ITS LESSEES.

The Colorado Supreme Court cited Phillips Chemical Company v. Dumas ..... ? U.S. ..... 4 L Ed. 2nd 384, as justifying its decision. (App. A infra, p. 3a.) The result of this Colorado decision is to subject all Federally-owned lands within Colorado, leased to private parties, to taxation. No statute of Colorado taxes the leasehold interest of a lessee of tax-exempt property except, as decided in the instant case, the United States is the lessor. As this Court said in Phillips Chemical v. Dumas at 4 L Ed. 2nd 389:

> "First, it is necessary to determine how other taxpayers similarly situated are treated. Such a determination requires 'an examination of the whole tax structure of the state'."

In Phillips v. Dumas a Texas statute imposing a heavier tax burden on federal lessees than on other lessees was held to unconstitutionally discriminate against the United States and those with whom it deals. In United States v. Detroit, 355 U.S. 466 this Court at 473 said:

> "It still remains true, as it has from the beginning, that a tax may be invalid even though it does not fall directly on the United States if it operates so as to discriminate against the Government or those with whom it deals. Cf. McCulloch v. Maryland, 4 Wheat 316."

Colorado taxes only lessees of the United States; lessees of the State of Colorado, of charities, churches and similar entities are not taxed at all upon their leasehold interests. It is well established that a State may not single out those who deal with the Government, in one capacity or another, for a tax burden not imposed on others similarly situated. Miller v. Milwaukee, 272 U.S. 713, Phillips v. Dumas, supra.

Since the Colorado statute, as interpreted by the Colorado Supreme Court, discriminates against the United States and its lessees, it is plainly unconstitutional.

CONCLUSION

For the foregoing reasons it is submitted that the questions presented by this appeal are substantial and of public importance. It is respectfully submitted that probably jurisdiction should be noted.

Respectfully submitted,

Fred M. Wixson,
Majestic Building,
Denver, Colorado

Eugene H. Mast,
First National Bank Bldg.,
Grand Junction, Colorado

Attorneys for Appellants.

August 5, 1960

APPENDIX

APPENDIX A

Opinion of the Supreme Court of Colorado
(Caption omitted)

Mr. Chief Justice Sutton delivered the opinion of the Court.

The parties are here in the same order as they appeared in the trial court and we will refer to them herein as plaintiffs and defendants.

Plaintiffs filed their action in the trial court to recover the payment of taxes paid under protest to the County Treasurer of Montrose County, Colorado. They are lessees of producing uranium lands under a lease from the United States of America entered into under the terms of the Atomic Energy Act of 1946.

As error they urge the finding of the trial court that the statute in question properly levies a tax upon them as lessees of such real property and upon their possessory rights as lessees of the United States. The plaintiffs further contend that the finding is the same as holding that the State of Colorado can lawfully assess and tax real estate owned by the United States of America.

The pertinent parts of the statute in question (C.R.S. '53, 137-5-4) read:

> "All mines and mining claims bearing gold, silver, lead, copper or other precious or valuable minerals and possessory rights therein classified under the laws of this state as producing mines shall be assessed annually for the purposes of taxation as provided in this section: * * *
>
> "(3) In case the mine or mining claim shall not be patented, or entered for patent, but shall be assessable and taxable under this chapter on account of producing gross proceeds, then the possession shall be the subject of the assessment, * * *"

Plaintiffs urge as error the finding of the trial court that the statute in question properly levies a tax against lessees of real property owned by the United States of America and upon the possessory rights of lessees of the United States.

The trial court determined that there is a difference between the assessment of possessory and leasehold rights of private citizens, and an attempt to assess United States of America in its ownership of the land in question. We agree that the former is valid under our statutes and that the latter would be an invasion of the rights of the federal government. For example, in *Elder v. Wood* (1908), 208 U.S. 226, 28 S. Ct. 263, 52 L. Ed. 464, it was held that a valid subsisting mining location or an interest therein is subject to taxation by the state, though the title to the land on which such mining claim is located is in the United States, and is part of the public lands. Thus here the plaintiff's possessory rights by virtue of their leases with the United States of America are such an interest as is subject to taxation by the State of Colorado. Also see *People v. Henderson* (1888), 12 Colo. 369. 21 Pac. 144, and *Wood v. McCombe* (1906), 37 Colo. 174, 86 Pac. 319.

The difference between possession and ownership have long been recognized and need no citation of authority. The lease in question is separate property, vendible, subject to the consent of the lessor, and inheritable, hence there is no reason to hold that it is not taxable as well, unless the tax can be said to be upon the separate and distinct ownership of the federal government.

What plaintiffs really seek as private business lessees of publicly owned and tax exempt property, is to be given an economic preference over their neighboring competitors, enabling them to escape their fair share of local tax responsibility by claiming there has been no severance of the bundle of rights making up total ownership into the dominant

and lesser estates just because the former title lies in an exempt owner.

The granting of constitutional immunity from state taxation does not rest on such insubstantial formalities as the designation of a party using property of the United States of America as a "lessee." The question as to the constitutionality of a tax should be approached in the light of its practical operation, not its definition or the particular designation applied to it. *Detroit v. Murray Corp.* (1957), 355 U.S. 489, 2 L. Ed. 2d 441, 78 S. Ct. 458; *Lawrence v. State Tax Com.* (1932), 286 U.S. 276, 76 L. Ed. 1102, 52 S. Ct. 556. Also see *U. S. v. Detroit*, (1957) 355 U.S. 466, 2 L. Ed. 2d 424, 78 S. Ct. 474 and *U. S. v. Muskegon* (1957), 355 U.S. 484, 2 L. Ed. 2d 436, 78 S. Ct. 483.

One situation where state tax laws may run afoul of the constitution in taking the divisible interests making up the overall bundle of rights, which together constitute a fee simple ownership, is when parcels of property or rights belonging to the same class are not taxed equally as required by due process of law. See *People v. Henderson, supra* and *Phillips Chemical Company v. Dumas Independent School District* (1960) ..... U.S. ....., (Supreme Court No. 40—October Term, 1959). The instant case does not fall within this exception.

Here it is obvious that no burden is placed upon the United States Government in either a direct or indirect manner by the tax in question, and no constitutional question is involved. In addition the tax is not laid alone on a producing mine or mining claim, but also may be upon the possessory rights therein. Since it is the plaintiff's admitted possession which is the subject of an assessment made without discrimination among the class of owners it follows that the tax in dispute was properly levied and collected.

The judgment of the trial court is affirmed.

Mr. Justice Hall and Mr. Justice Frantz not participating.

Judgment of the Supreme Court of Colorado
(Caption omitted)

This cause having been brought to this court by writ of error to review the judgment of the District Court of Montrose County, and having been heretofore argued by counsel and submitted to the consideration and judgment of the court upon the matters assigned as constituting error in the proceedings and judgment of said District Court, and it now appearing to the Court that there is no error in the proceedings and judgment of said District Court,

It is therefore ordered and adjudged that the judgment of said District Court be, and the same is hereby, affirmed, and that it stand in full force and effect; and that this cause be remanded to said District Court for such other and further proceedings, according to law, as shall be necessary to the final execution of the judgment of said District Court in the cause, notwithstanding the said writ of error.

It is further ordered and adjudged that the defendants in error do have and recover of and from said plaintiffs in error their costs in this court expended, to be taxed.

(Entered Monday, March 28, 1960)

PETITION FOR REHEARING
Filed in Colorado Supreme Court
(Caption omitted)

Plaintiffs in Error would respectfully direct the attention of the Court to the following points which have been overlooked or misapprehended:

I.

THE NATURE OF THE TAX LEVIED BY C.R.S. '53 137-5-4.

This statute provides if mining property be sold for taxes levied thereunder, such sale shall pass the title. C.R.S. '53, 137-5-4 (3), cited page 12, plaintiffs' opening brief. The

validity of Treasurers' Deeds issued for non-payment of taxes levied under this statute has been upheld. *Wood v. McCombs*, 37 Colo. 74, *Eider v. Wood*, 208 U.S. 226, 53 L. Ed. 464, cited page 26, plaintiffs' opening brief. These cases dealt with the taxability of mining claims and the transfer of title by Treasurers' Deed issued for the non-payment of taxes levied under this statute. If this statute, which levies a tax resulting in the issuance of a Treasurers' Deed conveying title to a specific tract of land, be regarded as not levying a tax on land the same has been misconstrued.

II.

A MINING CLAIM IS PRIVATE PROPERTY, NOT OWNED BY THE UNITED STATES.

The location of a mining claim creates private property in the locator. Such a location has the effect of a grant by the United States. Ickes v. Virginia-Colorado Development Corp., 259 U.S. 639, 79 L. Ed. 1627, cited page 18, plaintiffs' opening brief. Mining claims, being privately owned property, are taxable. The distinction between a privately owned, taxable, mining claim and lands belonging to the United States, which it leases, has not been apprehended.

III.

TAXING OF A LESSEE OF THE UNITED STATES.

The Court has held in its opinion announced in this case on March 28, 1960, that when the United States as the owner of land in Colorado leases its land to private citizens, the possessory right of such lessee is subject to taxation because the lessee has a possessory right under the lease. The Court appears to rely upon *Detroit v. Murray Corp.* (1957) 355 U.S. 489, 2 L. Ed. 2d 441, 78 S. Ct. 458; *U. S. v. Detroit* (1957) 355 U.S. 466, 2 L. Ed. 2d 424, 78 S. Ct. 474 and *U. S. v. Muskegon* (1957) 355 U.S. 484, 2 L. Ed. 2d 436, 78 S. Ct. 483 as authority for such holding. These cases upheld the validity of a Michigan statute which specifically levied a

tax on such a lessee. The Michigan statute upheld by these cases is set out at page 20 of plaintiffs' opening brief. If these cases be regarded as authority for taxing the possessory right of a lessee of tax-exempt real estate in the absence of specific legislative enactment authorizing the levy of such a tax, the cases have been misconstrued and the holding of these cases extended beyond the holding of the United States Supreme Court. These cases are not authority for taxing the possessory right of a lessee of the United States on account of his possession as lessee of lands of the United States in the absence of an Act of Legislature levying such tax. Vast areas of lands owned by the United States within Colorado are used or possessed by private industry; the possessory rights of such users are not and never have been taxed. No cases are cited or known holding that the right of a lessee of the United States to be in possession of lands of the United States under a lease from the United States is taxable in the absence of legislative enactment levying such a tax.

IV.

C.R.S. '53, 142-1-4 EXEMPTS FEDERAL LANDS FROM TAXATION.

This statute, cited at page 25, plaintiffs' opening brief, provides that lands of the United States shall be and continue exempt from all state, county and municipal taxation. This statute does not appear to have been considered, although the opinion recognizes that the land is owned by the United States. The lands leased to plaintiff are not transformed into privately owned property, or into mining claims which are privately owned property by virtue of being made the subject matter of a lease from the United States. These lands, being property of the United States, are not subject to tax.

WHEREFORE, it is prayed that this Honorable Court grant a rehearing.

ORDER OF SUPREME COURT OF COLORADO DENYING PETITION FOR REHEARING

(Caption omitted)

The Court having considered the motion of plaintiffs in error for rehearing in this cause, and being sufficiently advised in the premises, it is this day ordered that said motion be, and the same hereby is denied.

(Entered April 18, 1960)

APPENDIX B

Judgment of The District Court, Montrose County

(Caption omitted)

The above matter came on for trial before the Court at Montrose, Colorado, on the 8th of September, 1958, the plaintiffs appearing by Eugene H. Mast and David Rosner, their attorneys, the County Treasurer, County Assessor and Board of County Commissioners appearing by George V. Kempf, County Attorney, and the State Treasurer appearing by Patricia H. Maloy, Assistant Attorney General, and Charles N. Fairlamb and J. F. Schneider as Amicus Curiae, and the Court having heard the evidence produced, and examined the exhibits, and having heard the arguments of counsel, took the matter under advisement and requested the filing of briefs and arguments, which were done and were exceeding helpful to the Court, and the Court having examined the briefs, FINDS, ADJUDGES AND DECREES as follows:

The plaintiffs claim they have been wrongfully assessed as to their taxes by Montrose County for the years of from 1951 through 1957 as their mining claims were all located on Government land, and they were operating under a lease, and that such land was not subject to taxation. The defendants take the position that the assessment was not of the land, but rather the possessory rights, and that the

amount of tax was governed by the operation of the mines located thereon and the proceeds derived therefrom.

The Court finds that the act under which the assessment was made is 137-5-4 of the 1953 Colorado Statutes Annotated, and as originally passed in 1887, provides for assessing of producing mines and possessory rights, and that act has been upheld by our own Supreme Court in the case of Wood v. McCombe, 37 Colo. 174, and affirmed in Elder v. Wood, 208 U.S. 226. Acts of similar import have been passed and upheld in the states of Michigan, California, and Montana; as appears in many of the cases cited in the briefs, possessory interests in public lands may be taxed as something separate and distinct from the title in fee, 84 C.J.S., page 383.

Many phases of the case have been ably discussed in the several briefs, but in view of the Court's decision, those matters need not be passed on.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the relief prayed for by plaintiffs be, and hereby is, denied, and defendants herein are granted their costs in this behalf expended.

Dated at Grand Junction, Colorado, this 3rd day of January, 1959.

BY THE COURT:

/s/ CHARLES E. BLAINE,
Judge.

IN THE

Supreme Court of the United States

October Term, 1959

No.

G. T. RUMMEL, MATTHEW P. ROWE, ROY M. EIDAL, M. M. HARDIN, doing business as LA SALLE MINING COMPANY, a Partnership,

Appellants,

v.

WILLIAM E. MUSGRAVE, as County Assessor of Montrose County, Colorado; RUTH E. GAINES, as County Treasurer of Montrose County, Colorado; ORIN E. SMITH, FRED E. SULLIVAN and DON E. WATSON, as the Board of County Commissioners of Montrose County, Colorado; and TIM ARMSTRONG, State Treasurer of the State of Colorado,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF COLORADO

MOTION TO DISMISS

DUKE W. DUNBAR,
Attorney General of the State of Colorado,

FRANK F. HICKEY,
Deputy Attorney General,

JOHN W. PATTERSON,
Assistant Attorney General,

104 State Capitol Building,
Denver 2, Colorado.

JOHN A. HUGHES,
7 South Townsand Avenue,
Montrose, Colorado.

Attorneys for Appellees.

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IN THE

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Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF COLORADO

MOTION TO DISMISS

Appellees move that the appeal of the Appellants in the within action be dismissed, or, in the alternative, to affirm the judgment below, on the ground that the appeal presents no question sufficiently substantial to warrant further argument.

STATEMENT

Appellants, G. T. Rummel, Matthew P. Rowe, Roy M. Eidal, M. M. Hardin, private citizens engaged in the mining business for private profit, seek by this action to clothe themselves with Governmental immunity and thereby obtain an economic advantage over other private citizens engaged in the mining industry in the State of Colorado. The Government of the United States is not a party and is not questioning the constitutionality of the statutes of the State of Colorado.

I.

THE STATUTE IN QUESTION, CHAPTER 137-5-4, COLORADO REVISED STATUTES, 1953, VOL. 5, PAGE 926, DOES NOT LEVY A TAX ON LANDS OF THE UNITED STATES OF AMERICA. THE STATUTE DOES LEVY A TAX ON THE POSSESSORY INTEREST OF THE APPELLANTS WHICH THEY OBTAINED BY LEASE FROM THE UNITED STATES OF AMERICA AND WHICH THE APPELLANTS HAVE USED TO THEIR GREAT ECONOMIC PROFIT.

Colorado Revised Statutes, 1953, 137-5-4 provides:

> "Assessment of producing mines. *All* mines and mining claims bearing gold, silver, lead, copper or other precious or valuable minerals and *possessory rights therein classified under the laws of this state as producing mines* shall be assessed annually for the purposes of taxation as provided in this section: . . ."

Taxation by the State of Colorado of the possessory interest in a mine on federal lands does not violate the Constitution of the United States or the statutes thereof.

It is contended by the Appellants that the tax levied against them is in effect a tax upon the property of the United States of America and that they are agents and servants of the United States entitled to the federal immunity from state taxation.

Early in the history of the State of Colorado it was contended that a tax upon a mine on unpatented public domain was a tax on the property of the United States and beyond the jurisdiction of the State. This contention was clearly overruled by the Supreme Court of the United States in *Elder v. Wood*, 208 U.S. 226, 231:

> "The title to the land on which this mining claim was located was in the United States. It was a part of the public lands, and although proceedings had been begun by the owners of the claim for the acquisition of the title to the land by patent, they were not concluded at the time of the assessment of the tax, and apparently no patent has ever been issued. Obviously the land was not taxable as the property of Wilhelmina Gude. The act by which the people of the territory of Colorao were enabled to form a state (§4 of act approved March 3, 1875, 18 Stat. at L. 474, chap. 139) provided that no taxes should ever be imposed upon lands or property of the United States. The claim of a Federal right was based upon this statute. But, assuming that under this statute a Federal question is raised, there was no taxation of the land in the case at bar. A statute of Colorado authorized the taxation of mining claims, whether patented or entered for patent or not, in these words: 'In case the mine or mining claim shall not be patented, or entered for a patent, but shall be assessable and taxable under this act on account of producing gross pro-

ceeds then, and in that case, the possession shall be the subject of the assessment, and if said mining property be sold for taxes levied, the sale for such taxes shall pass the title and right of possession to the purchaser, under the laws of Colorado.' Laws 1887, pp. 340, 341, Mill's Anno. Stat. §§3222-3225. The construction of this statute and the conformity to it of the proceedings of the taxing officials were questions exclusively for the supreme court of the state, and we have no authority to review its determination of them. That court held that what was assessed was not the land on which the mining claim was located, but the claim itself; that is to say, the right of possession of the land for mining purposes. It is agreed that the Comstock lode was a 'valid subsisting mining location,' and, at the time of the assessment of the tax, Wilhelmina Gude was the owner of the undivided interest in it which is in controversy here. Such an interest from early times has been held to be property, distinct from the land itself, vendible, inheritable, and taxable. Forbes v. Gracey, 94 U.S. 762, 24 L. ed. 313; Belk v. Meagher, 104 U.S. 279, 283, 26 L. ed. 735, 737; Mannel v. Wulff, 152 U.S. 505, 510, 38 L. ed. 532, 534, 14 Sup. Ct. Rep. 651; St. Louis Min. & Mill. Co. v. Montana Min. Co., 171 U.S. 650, 655, 43 L. ed. 320, 322, 19 Sup. Ct. Rep. 61; 1 Lindley, Mines, §§535 to 542, inclusive. The state, therefore, had the power to tax this interest in the mining claim and enforce the collection of the tax by sale. The tax deed conveyed merely the right of possession and affected no interest of the United States."

The basic rights held by the locator of a mining claim and by the Appellants as lessees of the United States are substantially the same. Each has the right of possession

of property the fee of which is owned by the United States. Each has the right to remove and sell valuable minerals from the land and thereby obtain an economic profit. This court in the case of *Oklahoma Tax Commission v. Texas Company*, 336 U.S. 342, 69 S. Ct. 561, 93 L. Ed. 721, discussed the rationale underlying intergovernmental taxation and stated:

> "It is true that this Court's more recent pronouncements have beaten a fairly large retreat from its formerly prevailing ideas concerning the breadth of so-called intergovernmental immunities from taxation, a retreat which has run in both directions to restrict the scope of *immunity of private persons seeking to clothe themselves with governmental character from both federal and state taxation.* The history of the immunity, by and large in both aspects, represents a rising or expanding curve, tapering off into a falling or contracting one.
>
> Our present problem lies on the constitutional level. It requires reconsideration of former decisions specifically in point together with later ones deviating in rationale. It is of substantial importance both for the states' powers of taxation and for the subjects on which they may impinge. Moreover, even though the immediate questions are closely related to federal policies concerning Indian lands, they are equally tangent to considerations affecting other types of situations raising questions of immunity. For these reasons it will not be amiss to consider the questions in the context of two conflicting courses of decision.
>
> Before we turn to the survey, however, two delimitations of the specific issues should be made.

These cases present no questions concerning the immunity of the Indian lands themselves from state taxation. There is no possibility that ultimate liability for the taxes may fall upon the owner of the land. Cf. Wilson v. Cook, 327 U.S. 474, dissenting opinion 489, 90 L. ed. 793, 804, 66 S. Ct. 663. Nor, as has been noted, do the cases involve challenges to the immunity from state taxation of royalty oil, the Indian's share of production.

and

"The Mountain Producers case was not decided on narrow, merely technical or presumptive grounds. Its very foundation was a *repudiation of those insubstantial bases for securing broad private tax exemptions, unjustified by actual interfering or destructive effects upon the performance of obligations to or work for the government, state or national.* The decision came as the result of experience and of observation of the constant widening of the exempting process from tax to tax to tax.

Since that decision, as we have noted, the process has been reversed in direction. True intergovernmental immunity remains for the most part. But, so far as concerns *private persons claiming immunity for their ordinary business operations (even though in connection with governmental activities), no implied constitutional immunity can rest on the merely hypothetical interferences with governmental functions here asserted to sustain exemption.* In the light of the broad groundings of the Mountain Producers decision and of later decisions, we cannot say that the Gipsy Oil, Large Oil and Barnsdall Refineries decisions remain immune to the effects of the Mountain

Producers decision and others which have followed it. They are out of harmony with correct principle, as were Gillespie and Coronado decisions and, accordingly, they should be, and they now are, overruled. This accords with the result reached in Santa Rita Oil & Gas Co. v. State Bd. of Equalization, 112 Mont. 359, 114 P. 2d 421. Moreover, since the decisions in Choctaw, O. & G. R. Co. v. Harrison, 235 U.S. 292, 59 L. ed. 234, 35 S. Ct. 27, and Indian Territory Illuminating Oil Co. v. Oklahoma, 240 U.S. 522, 60 L. ed. 779, 36 S. Ct. 453, both supra, rest upon the same foundations as those underlying the Gipsy Oil, Large Oil and Barnsdall Refineries decisions, indeed supplied those foundations, we think they too should be, and they now are overruled." (Emphasis supplied.)

This Court also discussed the rationale underlying the question of intergovernmental taxation in *U. S. v. Detroit*, 355 U.S. 466; pages 469 and 470, 78 S. Ct. 474, 2 L. Ed. 2d 424:

"This Court has held that a State cannot constitutionally levy a tax directly against the Government of the United States or its property without the consent of Congress. McCulloch v. Maryland (U.S.) 4 Wheat. 316, 4 L. Ed. 579; Van Brocklin v. Tennessee, 117 U.S. 151, 29 L. ed. 845, 6 S. Ct. 670. At the same time it is well settled that the Government's constitutional immunity does not shield private parties with whom it does business from state taxes imposed on them merely because part or all of the financial burden of the tax eventually falls on the Government. See, e.g., James v. Dravo Contracting Co., 302 U.S. 134, 82 L. ed. 155, 58 S. Ct. 208, 114 ALR 318; Graves v. New York, 306 U.S. 466, 83 L. ed. 927, 59 S. Ct.

595, 120 ALR 1466; Alabama v. King & Boozer, 314 U.S. 1, 86 L. ed. 3, 62 S. Ct. 43, 140 ALR 615. Of course in determining whether a tax is actually laid on the United States or its property this Court goes beyond the bare face of the taxing statute to consider all relevant circumstances.

The Michigan statute challenged here imposes a tax on private lessees and users of tax-exempt property who use such property in a business conducted for profit. Any taxes due under the statute are the personal obligation of the private lessee or user. The owner is not liable for their payment nor is the property itself subject to any lien if they remain unpaid. So far as the United States is concerned as the owner of the exempt property used in this case it seems clearly that there was no attempt to levy against its property or treasury.

Nevertheless the Government argues that since the tax is measured by the value of the property used it should be treated as nothing but a contrivance to lay a tax on that property. We do not find this argument persuasive. *A tax for the beneficial use of property*, as distinguished from a tax on the property, itself, has long been a commonplace in this country. See Henneford v. Silas Mason Co., 300 U.S. 577, 582, 583, 81 L. ed. 814, 818, 819, 57 S. Ct. 524. In measuring such a use tax it seems neither irregular nor extravagant to resort to the value of the property used; indeed no more so than measuring a sales tax by the value of the property sold. Public Act 189 was apparently designed to *equalize the annual tax burden carried by private businesses using exempt property with that of similar businesses using non-exempt*

property. Other things being the same, it seems obvious enough that use of exempt property is worth as much as use of comparable taxed property during the same interval. In our judgment it was not an impermissible subterfuge but a permissible exercise of its taxing power for Michigan to compute its tax by the value of the property used."

And at pages 472 and 473:

"Here we have a tax which is imposed on a party using tax exempt property of its own 'beneficial personal use' and 'advantage.'

It is undoubtedly true, as the Government points out, that it will not be able to secure as high rentals if lessees are taxed for using its property. But as this Court has ruled in James v. Dravo Contracting Co., 302 U.S. 134, 82 L. ed. 155, 58 S. Ct. 208, 114 ALR 318; Alabama v. King & Boozer, 314 U.S. 1, 86, L.ed. 3, 62 S. Ct. 43, 140 ALR 645, and numerous other cases, *the imposition of an increased financial burden on the Government does not by itself vitiate a state tax.* King & Boozer offers a striking example. There a private party, acting under contract with the United States, purchased materials which the contract required him to transfer to the Government. At the same time the Government agreed to pay his costs plus a fixed fee so a state excise levied on his purchase was passed directly and completely to the Government. Yet despite the immediate financial burden imposed on the United States, this Court, without dissent, upheld the tax.

We are aware of course that the general princi-

ples laid down in Dravo, King & Boozer and subsequent cases do not resolve all the difficulties in the area of intergovernmental tax immunity, but they were adopted by this Court, with the full support of the Government, as the least complicated, the most workable and the proper standards for decision in this much litigated and often confused field and we adhere to them."

II.

"THE STATUTE IN QUESTION DOES NOT CREATE A LIEN ON THE LANDS OF THE UNITED STATES, BUT UPON THE POSSESSORY INTEREST OF THE APPELLANTS.

Chapter 137-5-4(3) Colorado Revised Statutes, 1953, provides in the event of non-payment of taxes the right of possession of the operator may be sold.

". . . . then the possession shall be the subject of the assessment and if said mining property shall be sold for taxes levied the sale for such tax shall pass the title and the right of possession to the purchaser under the laws of Colorado, . . ."

Clearly the "property" to be sold is the bundle of rights giving rise to the right of possession, the location in case of a mining claim, the lease, in case of the Appellants. It is not the fee title the statute is speaking of. *Elder v. Wood*, supra.

Appellants complain that the County of Montrose can not sell their interest in the lease because the United States must approve any assignment of the lease. Again the private individuals are seeking to rely upon a right

vested in the United States, which the United States has not asserted for themselves. In the first place the Appellants' interest in the lease in this case has not been sold for non-payment of taxes. Secondly, there is no reason to presume that the person who would buy Appellants' interest in the lease at a tax sale would not be fully qualified to mine the land and fully acceptable to the United States. Surely there are other qualified miners than the Appellants.

If it be assumed that the lease could not be sold at tax sale, it is elementary that this would not discharge the tax liability but that the tax could be collected by civil action for the debt. We quote from *Pinnacle Gold Mining Co. v. People*, 58 Colo. 86, 91, 143 P. 837:

> "The authorities are not in accord, but it seems to us that the better way to dispose of it is to say that if the special remedy provided by the statute for the collection of taxes is not effectual to compel the payment in spite of the taxpayer's determination not to pay, then resort may be had to an action against the taxpayer; otherwise the revenue of the state would depend upon the willingness of the taxpayer to pay, and experience has demonstrated that taxes are paid with more or less [illegible] alacrity.

In a note in 11 L. R. A. 818, it is said that the preponderance of the authorities is to the effect that either debt or assumpsit may be maintained for the recovery of the taxes as debt lies for a sum of money certain, due by statute. In State v. Georgia Co., 112 N. C. 34, 17 S. E. 10, 19 L. R. A. 485, it is said that a tax "is not a debt in its most limited sense; that is, it is not liable to set-off and the other incidents of a

simple contract between individuals. This is so on grounds of public policy, and also because though a debt (or due) it does not arise out of contract * * *. But it is a debt in the higher sense of the word.'

If the legislature has not provided the state with an effectual remedy to collect the debt due it, it appears to be reasonable to say that the state may resort to the ordinary remedy provided in the case of any other corporati .. to whom a debt is due."

The lien created by chapter 137-1-3 Colorado Revised Statutes, 1953:

"* * * Taxes levied upon real estate shall be perpetual lien upon such real estate, until such taxes and any penalty, charges and interest which may accrue thereon shall be paid, and such liens have priority over all other liens. * * *"

and by Colorado Session Laws, 1957, Chapter 267, page 806, Sec. 13:

"Taxes levied upon real estate shall be a perpetual lien upon such real estate until such taxes and any interest, penalties and charges which may accrue thereon shall have been paid, except as otherwise provided in this chapter, and such liens shall have priority over all other liens. * * *"

means a lien on the possessory interest of the operator, the location in the case of a mining claim, the lease in the case of the Appellants. *Elder v. Wood*, supra. It does not create a lien on the fee title of the United States.

III.

THE STATUTE DOES NOT DISCRIMINATE AGAINST THE UNITED STATES AND THOSE WITH WHOM IT DEALS.

Appellants in this appeal seek to raise for the first time the question that the statute, 137-5-4 Colorado Revised Statutes, 1953, discriminates against the United States and those with whom it deals. The alleged discrimination was not referred to in the Appellants' complaint; it was not argued to the trial court; no evidence was presented in the trial court to show such discrimination. The question was not argued in Appellants' brief before the Supreme Court of Colorado.

The statute does not make any exception on possessory interests. It says "*All* mines and mining claims . . . and possessory interests therein classified under the laws of this state as producing mines shall be assessed annually for the purpose of taxation as provided in this section:" 137-5-4, Colorado Revised Statutes, 1953.

The conclusion that a private person holding a mining lease from the State of Colorado, or any of its sub-divisions or from any charitable institution would not be subject to the same tax as a lessee from the United States is not supported by the record, the statute in question and is contrary to the fact.

Chapter 137-5-4, Colorado Revised Statutes, 1953, is in no way comparable with Article 5248 of the Revised Civil Statutes of Texas, as amended in 1950, which was discussed in *Phillips Chemical Co. v. Dumas*, ... U. S. ....., 4 L. ed. 2d, 384, at pages 386 and 387. "Article 5248 before provided a general tax exemption for land and im-

provements held, owned, used and occupied by the United States for Public purposes. In 1950, the Texas Legislature added two provisions to Article 5275, one providing for taxation of privately owned personal property located on federal lands, and the other as follows:

> "(P)rovided, further, that any portion of said lands and improvements which is used and occupied by any person, firm, association of persons or corporation in its private capacity, or which is being used or occupied in the conduct of any private business or enterprise, shall be subject to taxation by this State and its political subdivisions, . . .
>
> "Article 7173 of the Revised Civil Statutes of Texas imposes a distinctly lesser burden on similarly situated lessees of exempt property owned by the State and its political subdivisions."

This Court logically held that lessees of the Federal government were not being treated the same as lessees from the State of Texas and its political subdivisions. *Phillip v. Dumas*, supra.

However, the situation created by the statutes in the *Phillips* case has no similarity to this case. A lessee of mining property is treated exactly the same whether the owner of the fee is the United States or the State of Colorado or any of its political subdivisions or a charitable institution. The fact that the owner of the fee in either case is exempt from taxation does not exempt the lessee from taxes put on his possessory interest. Neither does different fee ownership give rise to any different method or amount of taxation.

This statute, 137-5-4 Colorado Revised Statute, 1953, does not levy a tax on lessees of lands not used for mining purposes whether the owner of the fee is the United States, the State of Colorado or any of its political subdivisions. The lessees of the United States are treated exactly the same as lessees of the State of Colorado and its political subdivisions.

The statutes permit equal opportunity for lessees of land owned in fee by an exempt entity to share in the payment of local and state taxes with other private persons engaged in business for a profit.

The statute, 137-5-4 Colorado Revised Statutes, 1953, is in harmony with the statement in *U. S. v. Detroit*, supra, pages 473 and 474.

> "But here the tax applies to every private party who uses exempt property in Michigan in connection with a business conducted for private gain. Under Michigan law this means persons who use property owned by the Federal Government, the State, its political subdivisions, churches, charitable organizations and a great host of other entities. The class defined is not an arbitrary or invidiously discriminatory one. As suggested before the legislature apparently was trying to equate the tax burden imposed on private enterprise using exempt property with that carried by similar businesses using taxed property. Those using exempt property are required to pay no greater tax than that placed on private owners or passed on by them to their business lessees. In the absence of such equalization the lessees of tax-exempt property might well be given a distinct economic preference over their neighboring competitors, as well as escaping their fair

share of local tax responsibility. Cf. Henneford v. Silas Mason Co., 300 U. S. 577, 583-585, 81 L. ed. 814, 819, 820, 57 S. Ct. 524. Nor is there any showing that the tax is in fact administered to discriminate against those using federal property. To the contrary undisputed evidence introduced by Appellees demonstrates that lessees of other exempt property have also been taxed."

CONCLUSION

For the foregoing reasons it is submitted that the Appeal be dismissed.

Respectfully submitted,

DUKE W. DUNBAR,
Attorney General of the State of Colorado,

FRANK E. HICKEY,
Deputy Attorney General,

JOHN W. PATTERSON,
Assistant Attorney General,

104 State Capitol Building,
Denver 2, Colorado,

JOHN A HUGHES,
7 South Townsand Avenue,
Montrose, Colorado,

Attorneys for Appellees.

FILE COPY

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JAMES R. BROWNING, Clerk

In the

Supreme Court of the United States

October Term, 1960

No. 303

G. T. RUMMEL, MATTHEW P. ROWE, ROY M. EIDAL, M. M. HARDIN, doing business as "LA SALLE MINING COMPANY", a Partnership,

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Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF COLORADO

BRIEF OF APPELLANTS OPPOSING APPELLEE'S MOTION TO DISMISS

Paul M. Wisner,
Majestic Building
Denver, Colorado
Eugene H. Mast
First National Bank Bldg.
Grand Junction, Colorado
Attorneys for Appellants

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ON APPEAL FROM THE SUPREME COURT OF THE STATE OF COLORADO

BRIEF OF APPELLANTS OPPOSING APPELLEE'S MOTION TO DISMISS

Appellees seek to show in their Motion to Dismiss that no substantial Federal problems are presented, and as a result this Appeal should be dismissed. Appellants submit that Appellees made admissions which not only point up the existence of substantial Federal questions, but which

emphasize the unconstitutionality of the tax levied against lands of the United States and assessed to Appellants as lessees of Federal property.

I. THE STATUTE AS APPLIED IS AN UNCONSTITUTIONAL TAX ON FEDERAL PROPERTY ASSESSED AGAINST APPELLANTS.

Appellees do not attempt to avoid the fact that the United States is, and at all times has been, the owner in fee simple of the land in question which the United States leased to Appellants as authorized by the 1946 Atomic Energy Act, Act of August 1, 1946, 60 Stat. 765. Appellees seek to show that the statute in question, Chapter 137-5-4, Colorado Revised Statutes 1953, does not levy a tax on lands owned by the United States; they also assert there is no substantial difference between the rights of the owner of an unpatented mining claim and of a lessee of the United States. Appellees do not explain how they reach the conclusion that the statute does not create a lien, and they ignore the provisions of Chapter 137-1-12, Colorado Revised Statutes 1953, defining real estate as including "all mines, minerals and quarries in and under the land and all rights and privileges appertaining thereto." Chapter 137-1-3, Colorado Revised Statutes, 1953, which makes taxes levied upon real estate a perpetual lien is likewise ignored. Rather, Appellees say, that inasmuch as this statute has been held to validly levy a tax against an unpatented mining claim, a tax may be levied against the lands of the United States leased to Appellants for mining purposes.

At all times since 1872 Congress has allowed citizens to locate mining claims upon public lands owned by the United States and which are not withdrawn from mineral entry. 30 U.S.C. 22. The rights which flow to the locator and owner of a mining claim so located have been definitely determined by this court in Ickes v. Virginia-Colorado Development Corporation, 259 U.S.639 where the Court said:

> "Restating the rule declared by many devisions, we said in Wilbur v. United States, 280 U.S. 306, 316, 74 L.Ed. 445, 449, 50 S. Ct. 103, that such a location,

perfected under the law, 'has the effect of a grant by the United States of the right of present and exclusive possession. The claim is property in the fullest sense of that term'. It is alienable, inheritable and taxable."

The owner of a mining claim is the owner of private property in the fullest sense of the term. The fact the United States retains record title for the purpose of performing the ministerial act of granting a patent if application is made therefor by the owner, does not divest a mining claim of its character of private property in the fullest sense of that term. Thus, in Elder v. Wood, 208 U.S. 226, this Court sustained a tax levied under this same Colorado statute against an unpatented mining claim and also sustained the validity of a Treasurer's Deed issued for the nonpayment of taxes levied under the statute. The tax, being a lien on land, a Treasurer's Deed for non-payment of the tax was held to have been properly issued.

Appellees would, and do state to this Court, that the rights of the owner of an unpatented mining claim and those of Appellants, lessees of land owned by the United States in fee, are substantially the same. This statement and the force of the argument flowing therefrom, that if Colorado can tax the owner of private property it can, under the same statute, tax lands of the United States and compel a lessee of the United States to pay such tax must be examined. Because Colorado can tax privately owned property under the statute it does not follow that, proceeding under this same statute, it can levy a tax on Federally owned property. The United States is not the owner in fee of unpatented mining claims a mining claim is private property. The Federally owned land leased to Appellants remains the fee property of the United States. While there is no need to here contrast the rights of the owner of private property with those of a lessee of lands owned by the United States in fee even a cursory examination of the lease here involved (Record, Page 24 et seq.) points up basic differences. The owner of a mining claim is vested with a full, unrestricted property right. The locator owns the mineral deposits and may mine

them or not as he chooses. Appellants, lessees of the United States, have the duty to extract ore and deliver it to a receiving agent designated by the United States, which reserved to itself the right of property in all mineral deposits and to ores mined but not shipped. In Elder v. Wood, 208 U.S.226, this Court upheld the validity of a Treasurer's Deed issued under the same statute here involved, because of the non-payment of taxes. Elder v. Wood does not hold that taxes can be levied against lands owned in fee by the United States. This case emphasizes that this Colorado statute in fact does levy a tax and create a lien upon land. If this were not so a Treasurer's Deed conveying the title to the land could not have issued. If applied to the taxation of lands owned by the United States in fee, the statute is unconstitutional. The tax created by this statute is not a production tax nor an excise tax on ores produced. The tax in question is a tax on land, and as construed by the Supreme Court of Colorado is a tax on lands owned in fee by the United States. As long as this statute is applied to the taxing of privately owned property—a mining claim, patented or unpatented—it is valid. The extension and interpretation of this statute to the taxing of lands owned by the United States in fee contravenes the Federal Constitution and violates McCulloch v. Md., 4 Wheat 316, which case has continuously been approved and undoubtedly continues to state the law.

Because the Treasurer's Deed, issued for the nonpayment of taxes levied under the statute here in question on an unpatented mining claim which is privately owned property, was held valid in Elder v. Wood, does not mean that a tax can be levied against lands owned in fee by the United States. In fact the case of Elder v. Wood, supra, emphasizes the fact that this statute does create a lien on land. As applied to lands owned by the United States the statue is unconstitutional.

Appellees strongly rely upon and at great length cite Oklahoma Tax Commission v. Texas Company, 336 U.S.342. In that case the principal question before this Court was whether the lessee of mineral rights is allotted and restrict-

ed Indian lands was immunized by the Constitution against payment of a nondiscriminatory tax on petroleum produced from such lands. The land in question was held in trust by the United States and not owned in fee by the United States. There was no question before the Court as to the levying of a tax on lands owned by the United States. Congress, not having created an immunity prohibiting the taxation of oil produced by the lessees of such Indian lands, this Court upheld the right of the State of Oklahoma to levy an excise tax on petroleum produced from such lands. In this Appeal we are not confronted with a tax levied on ore produced from lands owned by the United States in fee, but this Appeal presents problems raised by a tax levied against lands of the United States for the nonpayment of which tax this Court has previously sustained the validity of a Treasurer's Deed.

The question presented by this Appeal is not whether the State of Colorado should or could levy an excise tax on ores produced from land owned by the United States in fee, or whether the State of Colorado should or could, as has the State of Michigan by statute approved in the Michigan cases[1] levy a tax against the lessee of tax-exempt real estate. The question raised by this Appeal is simply whether a tax can be levied against lands owned by the United States in fee and whether a lessee of the United States can be compelled to pay such tax.

Appellees confuse the property rights owned by the locator of a mining claim with those of a lessee of the United States. The locator of a mining claim has a property right which is real property. Appellants, as lessees of the United States, have a right which is a strictly limited leasehold right and which is personal not real property.

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[1]United States v. City of Detroit, 355 U.S.466, United States v. Township of Muskegon, 355 U.S.48.; City of Detroit v. Murray Corp, 355 U.S.489.

II. THE STATUTE DISCRIMINATES AGAINST THE UNITED STATES AND ITS LESSEES.

The question of discrimination was first injected into this case by the Colorado Supreme Court when that Court announced in its opinion that a state tax law might run afoul of the Constitution when parcels of property belonging to the same class are not taxed equally as required by due process of law, citing Phillips Chemical Company v. Dumas Independent School District, ... U.S....., 4 L.Ed. 2d.384. The fact remains that no statute of Colorado levies a tax upon the possessory rights of lessees of tax-exempt lands, whether the same be owned by the State, the United States, or by a tax exempt entity. As a result of the decision from which this appeal is taken, only lessees of the United States are taxed. The State of Colorado does not tax lessees of State-owned land, or of any tax-exempt entity.

CONCLUSION

For these reasons, and for the reasons set forth in the Jurisdictional Statement, it is respectfully submitted that probable jurisdiction should be noted.

Respectfully submitted.

FRED M. WINNER,
Majestic Building
Denver, Colorado

EUGENE H. MAST
First National Bank Bldg.
Grand Junction, Colorado

Attorneys for Appellants

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